

MCA -- OCT. 1999

PART 14

Montana Telemarketing Registration and Fraud Prevention Act

30-14-1401. Short title. This part may be cited as the "Montana Telemarketing Registration and Fraud Prevention Act".

History: En. Sec. 1, Ch. 342, L. 1999.

30-14-1402. Purpose--scope--rulemaking.

- (1) The purposes of this part are to require telemarketers to register in this state, to establish standards of conduct for telemarketers, and to provide penalties for violations of this part.
- (2) This part does not apply to any claim brought by a person under Title 30, chapter 14, part 5, and the provisions of Title 30, chapter 14, part 5, do not apply to any claim brought by a person pursuant to the provisions of this part.
- (3) The department shall adopt rules to implement the provisions of this part. The rules must include but are not limited to rules:
 - (a) establishing forms and procedures for registration, registration renewal, and bonding of sellers of telemarketers;
 - (b) for administering a telemarketing fraud consumer awareness program; and
 - (c) ensuring that proper procedures are in place for maintaining civil and criminal actions for violations of this part.

History: En. Sec. 2, CH. 342, L. 1999.

30-14-1403. Definitions. As used in this part, the following definitions apply:

- (1) "Consumer" means a person who is or may be required to pay for goods or services offered by a seller or telemarketer through telemarketing.
- (2) "Department" means the department of Administration created in 2-14-1801.
- (3) "Goods or services" means any real property, any tangible or intangible personal property, or services of any kind provided or offered to a person.
- (4) "Material aspect" means any factor likely to affect a person's choice of or conduct regarding goods or services. The term includes currency values and comparative expressions of value, including but not limited to percentages or multiples.
- (5) "Person" means a natural person, corporation, trust, partnership, incorporated or unincorporated association, or other legal entity.
- (6) "Prize" means anything offered, purportedly offered, given, or purportedly given to a person by chance

- (7) "Prize promotion" means a sweepstakes or other game of chance or an oral or written representation, express or implied, that a person has won, has been selected to receive, or is eligible to receive a prize or purported prize.
- (8) "Seller" means a person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the consumer in exchange for consideration.
- (9) "Solicitation" means a written or oral notification or advertisement that:
 - (a) is transmitted by or on behalf of a seller or telemarketer by any printed, audio, video, cinematic, telephonic, or electronic means to a consumer; and
 - (b) in the case of a notification or advertisement other than by telephone, either of the following conditions is met:
 - (i) the notification or advertisement is followed by a telephone call from a seller or telemarketer; or
 - (ii) the notification or advertisement induces a response by telephone and, through that response, a seller or telemarketer attempts to make a sale of goods or services.
- (10) "Supervised financial organization" means any bank, trust company, savings and loan association, mutual savings bank, credit union, industrial loan company, consumer finance lender, commercial finance lender, or insurer, provided that the organization is subject to supervision by an agency of this or any other state of the United States or an agency, bureau, or department of government of the United States.
- (11) "Telemarketer" means a person, located within or outside of this state, who in connection with telemarketing initiates or receives telephone calls to or from a consumer in this state. The term includes a seller directly engaged in telemarketing on the seller's own behalf or a person engaged in telemarketing at the direction of a seller.
- (12) "Telemarketing" means a plan, program, or campaign that is conducted by telephone to induce the purchase of goods or services and that involves more than one telephone call to a consumer.

History: En. Sec. 3, Ch. 342. L. 1999.

30-14-1402. Registration of sellers or telemarketers.

- (1)
 - (a) Unless exempt under 30-14-1405, a person may not act as a seller or telemarketer without first having registered with the department.
 - (b) The initial application for registration must be approved by the department prior to a seller or telemarketer offering or offering for sale consumer goods or services through any medium.
 - (c) A registered seller or telemarketer shall submit an application for renewal of registration annually to the department.
 - (d) The application for a certificate of registration or renewal must include but is not limited to the following information:

- (i) the true name, current address, telephone number, and location of the seller or telemarketer, including each name under which the seller or telemarketer intends to engage in telemarketing;
 - (ii) each occupation or business that the seller's or telemarketer's principal owner has engaged in for the 2 years immediately preceding the date of the application;
 - (iii) whether any principal or manager has been convicted or pleaded guilty to or is being prosecuted by indictment for racketeering, violations of state or federal securities laws, or a theft offense;
 - (iv) whether there has been entered against any principal or manager an injunction, a temporary restraining order, or a final judgment in any civil or administrative action involving fraud, theft, racketeering, embezzlement, fraudulent conversion, misappropriation of property, or violation of any federal or state consumer protection law. The information must include any pending litigation against the applicant.
 - (v) whether the seller, at any time during the previous 7 years, has filed for bankruptcy, been adjudged bankrupt, or been reorganized because of insolvency;
 - (vi) the true name, current home address, date of birth, social security number, and all other names of the following:
 - (A) each telemarketer or other person to be employed by the seller;
 - (B) each person participating in or responsible for the management of the seller's business; and
 - (C) each person, office manager, or supervisor principally responsible for the management of the seller's business;
 - (vii) the name, address, and account number of every institution where banking or any other monetary transactions are conducted by the seller; and
 - (viii) a copy of all scripts, outlines, or presentation material that the seller will require a telemarketer to use when soliciting, as well as all sales information to be provided by the seller to a purchaser in connection with any solicitation.
- (2) (a) The application for registration or renewal must be accompanied by a surety bond in the amount of \$50,000. The bond must provide for indemnification to the state of Montana for any person suffering a loss as the result of violation of this part.
- (b) The surety may for any cause cancel the bond upon giving a 60-day written notice by certified mail to the applicant and to the department. Unless the bond is replaced by that of another surety before the expiration of the 60-day notice of cancellation, the registration of the seller or telemarketer must be treated as lapsed.
- (c) The surety bond must remain in effect for 1 year from the period the telemarketing business ceases to operate in this state.
- (d) (i) Any business required under [sections 1 through 14] to file a bond with a registration application may file, in lieu of the bond, a certificate of deposit, cash, or a government bond in the amount of \$50,000.

- (ii) The department shall hold the cash, certificate of deposit, or government bond for 1 year from the period the telemarketing business ceases to operate in this state or registration lapses in order to pay claims made against the telemarketing business for its activities during its period of operation in this state.
 - (iii) For the purposes of this section, "government bond" means any United States bond, treasury note, or other public debt obligation of the United States that is unconditionally guaranteed as to both interest and principal by the United States.
- (e) The registration of a telemarketing business must be treated as lapsed if at any time the amount of the bond, cash, certificate of deposit, or government bond falls below the amount required by this section.
- (f) The aggregate liability of the surety company to the state of Montana for all persons injured by seller or telemarketer's violations may not exceed the amount of the bond.
- (3) The following constitute a violation of this part:
 - (a) failure to register, maintain, or renew a registration if required;
 - (b) failure to meet the surety bond requirement if required to provide a bond;
 - (c) including any false or misleading information on a registration application; and
 - (d) misrepresenting that a seller or telemarketer is registered.
- (4) A violation of subsection (3) of this section also constitutes a violation of 30-14-103 and is subject to the penalty provisions of 30-14-1414 and the Montana Unfair Trade Practices and Consumer Protection Act of 1973.

History: En. Sec 4, Ch. 342, L. 1999.

30-14-1405 Exemptions from registration and bonding. The registration and bonding requirements of 30-14-1404 do not apply to:

- 1) any securities, commodities, or investment brokers, dealers, or investment advisers or any associates of securities, commodities, or investment brokers, dealers, or investment advisers who are subject to licensure or registration by the securities and exchange commission, the national association of securities dealers, or another self-regulatory organization, as defined by 15 U.S.C. 78(c), or by an agency of this state or any other state and who are soliciting within the scope of their license or registration;
- 2) a person engaged in solicitation for a religious, charitable, political, educational, or other noncommercial purpose or a person soliciting for a domestic or foreign nonprofit corporation that is registered with the Montana secretary of state;
- 3) a business-to-business sale;
- 4) a person that solicits sales by periodically publishing and delivering a catalog of the person's merchandise to prospective purchasers, if the catalog:
 - (a) contains a written description or illustration of each item offered for sale;
 - (b) includes the business or home address of the person soliciting the sale;
 - (c) includes at least 20 pages of written material and illustrations;

- (d) is distributed in more than one state; and
- (e) has a circulation by mailing of not less than 150,000;
- 5) a person who solicits contracts for maintenance or repair of goods previously purchased from that person or from the person on whose behalf the solicitation is made;
- 6) a person soliciting a transaction regulated by the commodity futures trading commission if the person is registered or temporarily licensed with the commodity futures trading commission under the Commodity Exchange Act, Title 7, chapter 1, of the United States Code, and the person's registration or license is not expired, suspended, or revoked;
- 7) a supervised financial organization or parent, subsidiary, or affiliate of a supervised financial organization;
- 8) an insurer authorized to transact insurance under Title 33, chapter 2, part 1, a person licensed as an insurance producer under Title 33, chapter 17, part 2, or staff members, licensed or unlicensed, of the producer;
- 9) a person soliciting the sale of services provided by a satellite or cable television system or a radio or television station authorized by the federal government or this state to provide services in this state;
- 10) a telephone company or its subsidiary or agent or other business regulated by the Montana public service commission, the federal communications commission, a rural telephone cooperative or its subsidiary or agent, or a federally licensed cellular telephone or radio telecommunication service provider;
- 11) a person soliciting business from consumers that have an existing business relationship with or have previously purchased from the business enterprise for which the person is soliciting;
- 12) a person operating a retail business establishment under the same name as that used in the solicitation and:
 - (a) the products or services are displayed and offered for sale at the business establishment; and
 - (b) a majority of the person's business involves the consumer obtaining the products or services at the business establishment;
- 13) a person soliciting for the sale of a magazine or newspaper of general circulation;
- 14) an issuer or a subsidiary of an issuer that is authorized to offer securities for sale in this state;
- 15) a book, video, record, or multimedia club, contractual plan, or arrangement:
 - (a) under which the seller provides the consumer with a form that the consumer may use to instruct the seller not to ship the offered merchandise;
 - (b) that is regulated by the federal trade commission regulation, 16 CFR 425, concerning the use of negative option plans by sellers in commerce; or
 - (c) that provides for the sale of books, videos, records, multimedia products, or other goods that are not covered by subsection (15)(a) or (15)(b), including continuity plans, subscription arrangements, standing order arrangements, single sales, supplements, or series arrangements under which the seller periodically ships merchandise to a consumer who has consented in advance to receive the merchandise on a periodic basis;
- 16) a real estate salesperson or broker licensed by this state;

- 17) a person that has provided telemarketing sales services under the same name and derives 50% of gross telemarketing sales revenue from contracts with persons exempted under this section from registration requirements;
- 18) a person soliciting the sale of food or food products if the solicitation is not intended to and does not result in a sale in excess of \$100 to a single address.

History: En. Sec. 5, Ch. 342, L. 1999.

30-14-1406. Telemarketing fraud consumer awareness program. The department shall establish and administer a telemarketing fraud consumer awareness program. The program must be funded as provided in 30-14-1407(2).

History: En. Sec. 6, Ch. 342, L. 1999.

30-14-1407. Authority of department, attorney general, and county attorney.

- (1) The department, the attorney general, and a county attorney have the same authority in enforcing and carrying out the provisions of this part as they have under Title 30, chapter 14, part 1.
- (2) All civil fines, costs, and fees received or recovered by the department pursuant to this section must be deposited into the state special revenue account to the credit of the department and must be used to defray the expenses of the department in discharging its administrative and regulatory powers and duties in relation to this section and to fund the telemarketing fraud consumer awareness program established in 30-14-1405. Any excess civil fines, costs, or fees must be deposited in the general fund.
- (3) All civil fines, costs, and fees received or recovered by the attorney general pursuant to this section must be deposited into the state special revenue account to the credit of the attorney general and must be used to defray the expenses of the office of the attorney general in discharging its duties in relation to this section and to establish a telemarketing fraud consumer awareness program similar to the program authorized in 30-14-1405. Any excess civil fines, costs, or fees must be deposited in the general fund.
- (4) All civil fines, costs, and fees received or recovered by a county attorney must be paid to the general fund of the county where the action was commenced.

History: En. Sec. 8, Ch. 342, L. 1999.

30-14-1408 Recordkeeping requirements.

- (1) (a) A telemarketer shall keep records subject to this section for a period of 24 months from the date the record is produced.

- (b) The records that must be kept for the 24-month period include:
 - (i) all substantially different advertising, brochures, telemarketing scripts, and promotional materials;
 - (ii) the name and last-known address of each prize recipient and the prize awarded;
 - (iii) the name and last-known address of each consumer, the goods or services purchased, the date the goods or services were shipped or provided, the amount of goods or services provided, and the amount paid by the consumer for the goods or services;
 - (iv) the name, any fictitious name used, the last-known home address and telephone number, and the job title for all current and former employees directly involved in telephone sales; however, if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee; and
 - (v) all written authorizations required to be provided or received under this part.
- (2) In the event of any dissolution or termination of a telemarketer's business, the principal of that telemarketer shall maintain all records as required under this section. In the event of any sale, assignment, or other change in ownership of the seller's business, the successor shall maintain all records required under this section.

History En. Sec. 8, Ch. 342, L. 1999.

30-14-1409. Acts and practices not governed by part. The following acts and practices are not subject to the provisions of this part:

- (1) telephone calls in which the sale of goods or services is not completed and payment or authorization of payment is not required until after a face-to-face sales presentation by the seller or telemarketer; and
- (2) telephone calls initiated by a consumer that are not the result of any solicitation by a seller or telemarketer.

History: En. Sec. 9, Ch. 342, L. 1999.

30-14-1410. Disclosure and contract requirements.

- (1) When contacting a consumer, a seller or telemarketer shall promptly disclose in a clear and conspicuous manner the following:
 - (a) the identity of the seller or telemarketer;
 - (b) that the purpose of the call is to sell goods or services;
 - (c) the nature of the goods or services; and
 - (d) that a purchase or payment is not necessary to be able to win a prize or participate in a prize promotion.

- (2) Prior to requesting any payment from the consumer a seller or telemarketer shall disclose in a clear and conspicuous manner the following information:
- (a) the total cost of the goods or services;
 - (b) all material restrictions, limitations, and conditions pertaining to the purchase of the goods or services;
 - (c) in any prize promotion:
 - (i) the odds of being able to receive the prize or, if the odds are not calculable in advance, the factors used in calculating the odds; and
 - (ii) the "no-purchase no-payment" method of participating in the prize promotion with either instructions on how to participate or an address or a local or toll-free telephone number that consumers may write or call for information on how to participate.
- (3) A seller or telemarketer may not misrepresent, directly or by implication, any of the following information:
- (a) any material aspect of performance, effectiveness, nature, or basic characteristics of goods or services;
 - (b) any material aspect of the nature or terms of the seller's or telemarketer's refund, cancellation, exchange, or repurchase policies; or
 - (c) any material aspect of a prize promotion, including but not limited to the nature or value of the prize or that a purchase or payment is required to win a prize or to participate in a prize promotion.
- (4) (a) Except as provided in subsection (6), in addition to any other right to revoke an offer, in the case of a sale made by telephone, the buyer may cancel the sale at any time prior to signing an agreement or offer to purchase the goods or services.
- (b) Cancellation occurs:
- (i) when written notice of cancellation is given to the seller or telemarketer; or
 - (ii) when written notice of cancellation, properly addressed and with postage prepaid, is deposited in the mail.
- (c) A notice of cancellation does not have to be in the form prescribed by the seller or telemarketer if it indicates the intention of the buyer to cancel the sale of goods or services.
- (d) In the case of goods, a telemarketing sale may not be canceled if the goods cannot be returned to the seller or telemarketer in substantially the same condition as when received by the buyer.
- (5) (a) Except as provided in subsection (6), a telemarketing sale may not be considered final until the purchaser receives the notice required by subsection (5)(b).
- (b) A seller or telemarketer shall furnish the purchaser, in the same language as that principally used in the sales presentation, a written notice, in not less than 10-point boldface type, containing a statement in substantially the following form:
- "You, the purchaser, may cancel this transaction without any penalty or obligation at any time prior to midnight of the third business day after receipt of this notice. If you cancel, any payments made by you under the sale will be returned within 10 business days of the day your

written notice of cancellation is received by the seller and any security interest connected to this transaction will be canceled.

If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this sales contract; or you may, if you wish, comply with the seller's instructions regarding returning the goods at the seller's expense and risk.

If you do make the goods available to the seller and the seller does not pick up the goods within 20 days of the date of your notice of cancellation or if the seller does not agree to assume the expense and risk of the return of the goods to the seller, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller or if you agree to return the goods to the seller and fail to return the goods, then you remain liable for the performance of all your obligations under the sales contract.

To cancel this transaction, mail, deliver, or telegram a written notice of cancellation to (name of seller) at the following address (address of the seller)."

- (c) In addition to the notice required in subsection (5)(b), the seller or telemarketer shall furnish the purchaser with:
 - (i) the seller's or telemarketer's name and the name of the person to whom a notice of cancellation is to be given if different from the seller's or telemarketer's name;
 - (ii) the legal name of the company for whom the seller or telemarketer is soliciting;
 - (iii) the seller's or telemarketer's street address and telephone number; and
 - (iv) the date and a description of the telephone solicitation.
- (6) A sale is not subject to the requirements of subsections (4) and (5) if the seller or telemarketer, at a minimum, has a policy of:
 - (a) accepting returns or canceling services in connection with the return of unused and undamaged goods or canceled services for a period of not less than 7 days after the date of delivery to the consumer and providing a cash refund for a cash purchase or issuing a credit for a credit purchase applied to the account that was debited;
 - (b) disclosing the seller's or telemarketer's refund and return policy to the consumer by telephone or in written material included with advertising or promotional material or with the delivery of the goods or services; and
 - (c) restoring payments or issuing credits pursuant to subsection (6)(a) within 30 days after the date on which the seller or telemarketer receives the returned goods or notice of cancellation of services. A seller or telemarketer who discloses in writing that a sale is subject to "satisfaction guaranteed", "free inspection", "a no-risk guarantee", or similar words or phrases must be considered to have met the review and return for refund policy requirements of this subsection.
- (7) It is an unfair and deceptive act or practice to fail to comply with or to misrepresent the requirements of this section.

- (8) In addition to subsection (7), it is a violation of [sections 1 through 14] for any seller or telemarketer to engage in any other unfair or deceptive conduct that would create a likelihood of confusion or misunderstanding to any reasonable consumer.
- (9) Failure to comply with the provisions of this section is a violation of 30-14-103 and is subject to the penalty provisions of 30-14-1401 and the Montana Unfair Trade Practices and Consumer Protection Act of 1973.

History: En. Sec. 10, Ch. 342, L. 1999.

30-14-1411. Prohibited acts and practices.

- (1) It is a violation of this part for a seller or telemarketer, purposely or knowingly, to engage in the following conduct:
 - (a) advertise or represent that registration as a seller or telemarketer equals an endorsement or approval by the state or any political subdivision of the state;
 - (b) assist, support, or provide substantial assistance to any telemarketer when the seller knew or should have known that the telemarketer was engaged in any act or practice violating 30-14-1408 or this section;
 - (c) request a fee in advance to remove derogatory information from or improve a person's credit history or credit record;
 - (d) request or receive payment in advance from a person to recover or otherwise aid in the return of money or any other item lost by the person in a prior telemarketing transaction; however, this subsection does not apply to services rendered to a person by a licensed attorney;
 - (e) obtain or submit for payment a check, draft, or other form of negotiable paper drawn on a person's checking, savings, bond, or other account without the person's express written authorization; or
 - (f) procure the services of any professional delivery, courier, or other pickup service to obtain immediate receipt or possession of a person's payment unless the goods are delivered with the opportunity to inspect them before any payment is collected.
- (2) Failure to comply with the provisions of subsection (1) constitutes a violation of 30-14-103 and is subject to the penalty provisions of 30-14-1414 and the Montana Unfair Trade Practices and Consumer Protection Act of 1973.

History: En. Sec. 11, Ch. 342, L. 1999.

30-14-1412. Abusive acts and practices.

- (1) It is an abusive telemarketing act or practice and a violation of this part for any seller or telemarketer to engage in the following conduct:
 - (a) use threatening, intimidating, or profane or obscene language;
 - (b) engage any person repeatedly or continuously with behavior a reasonable person would consider annoying, abusive, or harassing;

- (c) initiate a telemarketing call to a person who has stated previously, in compliance with 16 CFR 310 and 47 CFR 64.1200, that the person does not wish to receive solicitation calls from that seller or telemarketer;
 - (d) engage in telemarketing to a person's residence at any time other than between 8 a.m. and 9 p.m. local time at the called person's location; or
 - (e) engage in any other conduct that would be considered abusive to any reasonable consumer.
- (2) The department or the attorney general may seek injunctive or declaratory relief or any other remedy provided in Title 30, chapter 14, part 1, for any violations of this section.

History: En. Sec. 12, Ch. 342, L. 1999.

30-14-1413. Civil remedies -- venue -- burden of proof.

- (1) The sale of any goods or services by an unregistered seller or telemarketer that is required to register is void. A person obtaining a judgment for damages, attorney fees, or costs against a seller or telemarketer pursuant to this section has the right to be reimbursed for those damages, attorney fees, or costs from any bond or security posted by the seller or telemarketer pursuant to the provisions of 30-14-1404.
- (2) A person that suffers a loss or harm as a result of an unfair and deceptive act or practice or a prohibited act or practice is entitled to recover actual damages or \$500, whichever is greater, attorney fees, court costs, and any other remedies provided by law.
- (3) In addition to the remedies provided in subsection (2), a person that suffers harm as a result of an abusive act or practice is entitled to receive injunctive or declaratory relief.
- 4)
 - (a) The department, the attorney general, or a county attorney, on behalf of state residents who have suffered a loss or harm as a result of a violation of [sections 1 through 14], may seek any remedy provided by Title 30, chapter 14, part 1.
 - (b) The proper place for trial for an action based on a claim of a violation of this part is the district court of Lewis and Clark County or the county in which the alleged violation occurred.
- 5) In a civil proceeding alleging a violation of this part, the burden of proving an exemption under 30-14-1405 or an exception to a definition contained in 30-14-1403 is on the person claiming the exemption or exception.

History: En. Sec. 13, Ch. 342, L. 1999.

30-14-1414. Penalties -- misdemeanor and felony violations -- burden of proof.

- (1)
 - (a) A person who fails to follow the requirements of 30-14-1404, 30-14-1408, 30-14-1410, 30-14-1411, or 30-14-1412 commits the offense of failure to

comply with the requirements of this part. Except as otherwise provided in 30-14-1411, this offense is specifically intended to be an absolute liability offense as provided for in 45-2-104.

- B) A person convicted of the offense of failure to comply with the requirements of this part shall be fined not to exceed \$500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.
 - C) Upon a second or subsequent conviction for the offense of failure to comply with the requirements of this part, a person shall be fined not to exceed \$50,000 or be imprisoned in the state prison for a term not to exceed 5 years, or both.
- (2) (a) A person commits the offense of telemarketing fraud when the person knowingly violates this part with the purpose of depriving an owner of property.
- (b) A person convicted of the offense of telemarketing fraud in which the value of the property does not exceed \$500 shall be fined not to exceed \$500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.
- (c) A person convicted of the offense of telemarketing fraud in which the value of the property exceeds \$500 or the person has engaged in telemarketing fraud as part of a common scheme shall be fined not to exceed \$50,000 or be imprisoned in the state prison for a term not to exceed 10 years, or both.
- (3) In any criminal proceeding alleging a violation of this part, the burden of producing evidence to support a defense based on an exemption under 30-14-1405 or an exception from a definition in 30-14-1403 is on the person claiming the exemption or exception.

History: En. Sec. 14, Ch. 342, L. 1999
